In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1122

DAVID C. HENNY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 527 F. 2d 479.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1975. On January 9, 1976, an amended opinion was issued and a petition for rehearing was denied. The petition for a writ of certiorari was filed on February 9, 1976 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence established violations of the wire fraud statute, 18 U.S.C. 1343.

2. Whether petitioner was denied a fair trial by a comment made by the court concerning certain materials given to the defense under the Jencks Act or by the procedures by which Jencks Act materials were supplied at trial.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Washington, petitioner was convicted of having committed wire fraud and of having aided and abetted the commission of wire fraud, in violation of 18 U.S.C. 1343 and 2. He was fined $1,000 on each of the ten counts on which he was convicted and was sentenced to ten concurrent terms of three years' imprisonment. The court of appeals affirmed petitioner's convictions on nine of the counts and reversed his conviction on the remaining count (Pet. App. A-1).[1]

The evidence at trial showed that petitioner—as president and principal stockholder of Whidbey Telephone Company ("Whidbey"), an independent telephone company franchised to serve two islands in Puget Sound, Washington—engaged in a multifaceted scheme to defraud two connecting telephone companies, General Telephone Company of the Northwest, Inc. ("General"), and Pacific Northwest Bell ("Bell"), of substantial revenues.[2] In essence,

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[1]The court of appeals reversed petitioner's conviction on Count IV of the indictment because the trial court had erroneously excluded certain evidence as outside the period referred to in the indictment (Pet. App. A-8).

[2]During the period of the fraudulent scheme charged in the indictment, Whidbey operated a toll center providing operator services for the manual timing and ticketing of all long distance calls originating on Whidbey and Hat Islands. Whidbey's facilities connected with General's facilities at Everett, Washington. General, in turn, connected with the Bell System at Seattle (Pet. App. A-1 to A-2).

the scheme involved the falsification of records of long distance telephone calls and had the effect of increasing, at the expense of General and Bell, Whidbey's net revenues under a division-of-revenue agreement between Whidbey and General.

Under the division-of-revenue agreement between Whidbey and General in effect during the period referred to in the indictment,[3] Whidbey agreed to turn over to General and a national toll pool all revenues realized from long distance telephone calls and General agreed to remit to Whidbey revenues approximating Whidbey's costs in handling such calls (V Tr. 164-171). The net revenue to which Whidbey was entitled under the agreement was computed by use of a formula, which had been developed on the basis of a study of Whidbey's toll costs (I Tr. 106-107). Application of the formula produced varying amounts of net revenue for Whidbey, depending upon the duration of the particular calls and whether the calls were "sent paid," "sent collect," or "received collect" (I Tr. 108-124; V Tr. 164-169).[4]

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[3]The rates for toll or long distance telephone calls were fixed by generally applicable tariffs, with interstate rates being regulated by the Federal Communications Commission and intrastate rates being set by the Washington Utilities and Transportation Commission. In order to provide its subscribers with access to long distance facilities, Whidbey entered into division-of-revenue agreements that apportioned the costs incurred and the revenues realized from telephone calls utilizing both facilities owned by Whidbey and by other telephone companies (see Pet. App. A-2).

[4]"Sent paid" calls were defined as those long distance calls originating at and charged to a Whidbey telephone. "Sent collect" calls were those originating at a Whidbey telephone but billed to the terminating telephone. "Received collect" calls terminated at and were charged to a Whidbey telephone (see Pet. App. A-2; I Tr. 108-109; VII Tr. 67).

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Although Whidbey turned over to General all revenues realized from toll calls, General remitted to Whidbey pursuant to the formula a fixed amount for each toll call billed to a Whidbey telephone. Thus, although Whidbey's payments to General for all telephone calls for which customer payments were made to Whidbey were affected by the duration of the calls, General's remissions to Whidbey were not similarly affected (see Pet. App. A-2). Other provisions of the agreement directed the payment to Whidbey of larger amounts for "sent paid" telephone calls than for "received collect" and "sent collect" calls (*ibid.*).

Petitioner fraudulently manipulated this settlement agreement in two ways. First, he directed his operators to misrepresent certain operator signals so as to change the status of calls from the "received collect" category to the more lucrative, for Whidbey, "sent paid" category (I Tr. 155-159; II Tr. 15-18, 179-180; V Tr. 126-129, 134-137; X Tr. 110-111). Second, petitioner fraudulently decreased the amount of Whidbey's payments to General by reporting "sent paid" calls as having been shorter than three minutes in duration when in fact many of the calls far exceeded three minutes (II Tr. 28-29, 118-119; IV Tr. 25-26; VI Tr. 94; IX Tr. 117-118, 196-202). By misrepresenting the duration of the toll calls, petitioner improperly reduced the amount of his payments to General and to the national toll pool.

Petitioner also engaged in a variety of other fraudulent practices depriving General and Bell of revenues belonging to them (see Pet. App. A-3 to A-4). Among other things, petitioner improperly used telephone codes on toll calls placed to Europe by himself and his friends to avoid the overseas operator responsible for timing and billing the calls, thereby defrauding Bell of its revenue for the calls (II Tr. 74-76, 188-190; IV Tr. 44-47, 155; V Tr. 155-158; X Tr. 84-85, 88). Petitioner also manipulated the sample study used to construct the formula apportioning revenues

between Whidbey and General in order to increase payments to Whidbey. He accomplished this by encouraging certain individuals, who were illegally using "blue boxes" to place toll-free calls, extensively to utilize a "conference circuit" he established during the period of the study (IV Tr. 91-93, 111-120; V Tr. 172-178; X Tr. 150-152).

ARGUMENT

1. Petitioner first contends (Pet. 6-12) that he was improperly convicted of having committed wire fraud, in violation of 18 U.S.C. 1343, on the basis of evidence tending to show simply that he had failed to comply with standard operating practices in the telephone industry. He asserts that his convictions violated fundamental elements of due process—*viz.*, the requirement that "prohibited activity be clearly and unambiguously proscribed, that the enactment of such prohibition not be delegated to private parties, and that the proscription not be unjustifiably discriminatory" (Pet. 7).

But the fact that the practices described in the indictment and established at trial may have violated standard operating practices in the telephone industry does not preclude petitioner's convictions for wire fraud. As noted, the evidence at trial showed that petitioner knowingly made misrepresentations as part of a plan to deceive others and to obtain money and property by false pretenses. In submitting the case to the jury, the court carefully described the elements of the offenses with which petitioner had been charged—including the requirement that the government prove beyond a reasonable doubt that petitioner had devised a scheme to defraud General and Bell of revenues with the specific intent to do so (XI Tr. 70-71). The court went on to define the phrase "scheme or artifice to defraud," as used in 18 U.S.C. 1343, as including (XI Tr. 72)—

> any plan or course of action intending to deceive others and to obtain by false or fraudulent pretenses, representations or promises, money or property from persons so deceived. A statement or representation is false or fraudulent within the meaning of the statute, if it is known to be untrue and made, or caused to be made[,] with intent to deceive.

In support of the contention that his convictions were not based upon proof of a scheme or artifice to defraud, but upon proof tending to show that he had violated standard industry operating practices, petitioner has relied upon (see Pet. App. A-16 to A-17 n. 4) a subsequent portion of the court's instructions in which the court stated (XI Tr. 73-74):

> The companies also, by agreement, divide the revenues obtained from the use of the combined toll facilities. In order to determine the proper proportions of revenue for each company whose facilities have been used for a toll call, the companies have adopted standard operating practices providing for the timing of calls, and the point of billing, the ticketing, and the types of billing for the type of calls that are carried on connecting company lines. Any billing practice that does not reflect the true nature of the toll call as to the billing time, place of origin, nature of the toll call, or fails to show the use of the connecting lines or any use of the toll line by any device that avoids the proper billing of the toll call by the proper carrier is unlawful.

We submit that this statement properly related the elements of the offense prescribed at 18 U.S.C. 1343 to the evidence adduced at trial. The statement did not permit the jury to convict petitioner on the basis of evidence showing that he had violated standard industry operating practices—rather, the statement correctly informed the jury that it is

unlawful under the wire fraud statute intentionally to employ any billing practice to avoid the proper billing of a toll call. See *Scott* v. *United States*, 448 F. 2d 581, 582 (C.A. 5); *Brandon* v. *United States*, 382 F. 2d 607, 610 (C.A. 10).

2. At one point during the trial, petitioner's counsel objected to the court's allowing the trial to continue while his co-counsel reviewed a statement of a government witness provided to the defense under the Jencks Act, 18 U.S.C. 3500 (II Tr. 143). Petitioner now contends (Pet. 12-14) that the court committed reversible error by stating, in overruling that objection, that co-counsel could review the statement without interrupting the trial because "[a]ll you are looking for is some inconsistency in her testimony, if there is any" (II Tr. 143).

As the court below correctly determined, however, although the statement quoted above might better have been left unsaid, it does not require the reversal of petitioner's convictions (see Pet. App. A-9 to A-10). Petitioner has not shown how he could have been prejudiced by the comment, which was made in the context of the essentially cumulative testimony of one of the many Whidbey telephone operators who testified concerning Whidbey's operating practices.

The decision of the court below with respect to this issue does not conflict with the holding in *United States* v. *Stahl*, 393 F. 2d 101 (C.A. 7). In *Stahl*, as in this case, the court of appeals held that while a comment by the trial judge concerning use by the defense of Jencks Act materials (which was similar to the comment made by the court in this case) had been improper, it did not require reversal of the defendant's conviction. See also *United States* v. *Frazier*, 479 F. 2d 983, 985-986 (C.A. 2).

Petitioner also incorrectly suggests (Pet. 12) that affirmance of his convictions conflicts with decisions in several other circuits which hold that it is ordinarily improper to require the defense to request Jencks Act materials in the presence of the jury. *E.g.*, *United States* v. *Curry*, 512 F. 2d 1299, 1302-1303 (C.A. 4); *United States* v. *Nielsen*, 392 F. 2d 849, 853-854 (C.A. 7); *Gregory* v. *United States*, 369 F. 2d 185, 191 (C.A. D.C.); *United States* v. *Frazier*, *supra*.[5] These cases uniformly hold that courts should permit such requests to be made outside the presence of the jury, if the defense so requests. The record does not indicate that the defense at any time approached the sidebar and requested the court's permission to ask for Jencks Act material outside the jury's presence. Petitioner's assertion that the defense requested the materials in the jury's presence because required to do so by the court is similarly without support in the record.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1976.

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[5]See also *Beaudine* v. *United States*, 414 F. 2d 397, 401-403 (C.A. 5); *Pallotta* v. *United States*, 404 F. 2d 1035, 1036-1037 (C.A. 1).

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